10

06-1195

No. 06-1196

FILED
MAR 2 2 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

KHALED A. F. AL ODAH, ET AL., PETITIONERS,

v.

UNITED STATES OF AMERICA, ET AL., RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DAVID J. CYNAMON
MATTHEW J. MACLEAN
OSMAN HANDOO
PILLSBURY WINTHROP SHAW PITTMAN LLP
2300 N Street, N.W.
Washington, DC 20037
202-663-8000

GITANJALI GUTIERREZ
J. WELLS DIXON
SHAYANA KADIDAL
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
212-614-6438

THOMAS B. WILNER
COUNSEL OF RECORD
NEIL H. KOSLOWE
AMANDA E. SHAFER
SHERI L. SHEPHERD
SHEARMAN & STERLING LLP
801 Pennsylvania Ave., N.W.
Washington, DC 20004
202-508-8000

GEORGE BRENT MICKUM IV
SPRIGGS & HOLLINGSWORTH
1350 "I" Street N.W.
Washington, DC 20005
202-898-5800

Counsel for Petitioners
Additional Counsel Listed on Inside Cover

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

JOSEPH MARGULIES
MACARTHUR JUSTICE CENTER
NORTHWESTERN UNIVERSITY
LAW SCHOOL
357 East Chicago Avenue
Chicago, IL 60611
312-503-0890

JOHN J. GIBBONS
LAWRENCE S. LUSTBERG
GIBBONS P.C.
One Gateway Center
Newark, NJ 07102
973-596-4500

MARK S. SULLIVAN
CHRISTOPHER G. KARAGHEUZOFF
JOSHUA COLANGELO-BRYAN
DORSEY & WHITNEY LLP
250 Park Avenue
New York, NY 10177
212-415-9200

BAHER AZMY
SETON HALL LAW SCHOOL
CENTER FOR SOCIAL JUSTICE
833 McCarter Highway
Newark, NJ 07102
973-642-8700

DAVID H. REMES
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
Washington, DC 20004
202-662-5212

MARC D. FALKOFF
COLLEGE OF LAW
NORTHERN ILLINOIS
UNIVERSITY
DeKalb, IL 60115
815-753-0660

PAMELA CHEPIGA
ANDREW MATHESON
KAREN LEE
SARAH HAVENS
ALLEN & OVERY LLP
1221 Avenue of the Americas
New York, NY 10020
212-610-6300

SCOTT SULLIVAN
DEREK JINKS
UNIVERSITY OF TEXAS
SCHOOL OF LAW
RULE OF LAW IN WARTIME
PROGRAM
727 E. Dean Keeton Street
Austin, TX 78705
512-471-5151

ANDREW A. JACOBSON
JENNER & BLOCK LLP
330 N. Wabash Avenue
Chicago, IL 60611-7603
312-923-2923

MARC A. GOLDMAN
JENNER & BLOCK LLP
601 13th Street, N.W.
Suite 1200 South
Washington, DC 20005-3823
202-609-6087

CLIVE STAFFORD SMITH
JUSTICE IN EXILE
636 Baronne Street
New Orleans, LA 70113
504-558-9867

DOUGLAS J. BEHR
KELLER AND HECKMAN LLP
1001 G Street, N.W.,
Suite 500W
Washington, DC 20001
202-434-4100

MICHAEL D. MORI
MAJOR, U.S. MARINE CORPS
Office Of Military Commissions
Office Of The Chief Defense
Counsel
1099 14th Street, N.W.,
Suite 2000E
Washington, DC 20005
202-761-0133 x116

ERWIN CHEMERINSKY
DUKE LAW SCHOOL
Science Drive &
Towerview Rd.
Durham, NC 27708
919-613-7173

STEPHEN YAGMAN
723 Ocean Front Walk
Venice, CA 90291
(310) 452-3200

The government argues that the issues raised in this Petition for Certiorari are not "ripe" because petitioners "have not yet exhausted their remedies under the DTA." Brief for the Respondents in Opposition ("Gov. Opp.") at 12. But the government's response demonstrates, in fact, that the key issues raised are ripe for determination by this Court, and that they should be decided now.

A habeas petitioner has no obligation to exhaust a remedy that is not adequate to vindicate the asserted right. *See, e.g., Wilwording v. Swenson*, 404 U.S. 249, 250 (1971).[1] As Judge Rogers made clear in her dissent below, the review provisions of the DTA, at least as they are interpreted by the D.C. Circuit, are plainly not adequate to vindicate petitioners' asserted habeas rights.

Section 1005(e)(2)(C)(i) of the DTA allows the D.C. Circuit to review a CSRT decision to determine whether it "was consistent with the standards and procedures specified by the Secretary of Defense for [CSRTs]" – in other words, whether the CSRTs followed their own procedures in reaching their determinations. Under that section, the court would be precluded from going behind the CSRTs to determine whether the definitions they used were legally sufficient and whether the procedures they followed were fair, adequate, and legitimate. That, however, is a fundamental requirement of habeas. As Justice Holmes famously wrote:

> [H]abeas corpus cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been pre-

[1] As explained in petitioners' Reply in support of their Motion to Expedite, there is serious doubt whether DTA review is even available to petitioners. *See* Reply to Respondents' Opposition to Motion to Expedite at 1 n.1.

> served, opens the inquiry whether they have been more than an empty shell.[2]

Any review process – such as the one set forth in Section 1005(e)(2)(C)(i) of the DTA – that limits the court to determining whether the jailor has followed its own rules, and precludes an inquiry into whether the rules themselves are adequate and more than an empty shell, cannot be an adequate or effective substitute for habeas.[3]

The DTA does provide a method for determining whether the standards and procedures followed by the CSRTs were adequate. Section 1005(e)(2)(C)(ii) (emphasis added) allows the D.C. Circuit to consider, "*to the extent the Constitution and laws of the United States are applicable*, whether the use of such standards and procedures to make

---

[2] *Frank v. Mangum*, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting). Justice Holmes' dissenting opinion was later made the law of the land in *Moore v. Dempsey*, 261 U.S. 86 (1923). *See Fay v. Noia*, 372 U.S. 391, 411 n.22 (1963). His words frequently have been quoted with approval. *See, e.g., Harris v. Nelson*, 394 U.S. 286, 291 n.2 (1969); *Chatman-Bey v. Thornburgh*, 864 F.2d 804, 807 (D.C. Cir. 1988) (en banc).

[3] Citing a number of cases reviewing convictions after trial by military tribunals, the government argues that "in the context of the decisions of military tribunals, this Court has repeatedly held that habeas does not provide for factual review . . . ." Gov. Opp. at 18. That may be so where the underlying process being reviewed allows for adequate factual development. Habeas, however, always enables the court to determine whether or not the underlying process being reviewed is fair, adequate, and legitimate and allows for adequate factual development. Any process that does not cannot be an adequate substitute for habeas, and habeas cannot be replaced and the courts restricted in their review of the legality of the detention by a process that is so inadequate. As Judges Green and Rogers concluded, and as pointed out in the Petition for Certiorari, the CSRTs were completely inadequate to test the legality of the detention. Pet. at 7-8, 12 n.24.

the determination is consistent with the Constitution and laws of the United States." The government, of course, has argued strenuously that the Constitution and laws of the United States are not applicable to these detainees because they are aliens held at Guantanamo. Gov. Opp. 19-25. It says, however, that review by this Court is premature because "the D.C. Circuit . . . can determine the nature of petitioners' rights, if any, under the 'laws of the United States' and the U.S. Constitution, and can decide whether the CSRT process violated any applicable rights." Gov. Opp. at 17. But the D.C. Circuit has already decided that issue. Based on *Johnson v. Eisentrager*, the D.C. Circuit held that petitioners have no constitutional rights and therefore are not entitled to constitutional review of the adequacy of the CSRT procedures. App. 15-17, 52-53.

The issue is therefore ripe for decision by this Court. It must be decided by this Court in order to determine the scope of review available under the DTA, as well as whether the government is correct in asserting that these petitioners have no constitutional protections whatsoever, including protections under the Suspension Clause of the Constitution. Those issues have been decided, albeit wrongly, by the D.C. Circuit. There are no remedies left for the petitioners to exhaust. These issues should be decided by this Court now so that these petitioners, imprisoned without a fair hearing for more than five years, are not forced to endure months and years more deprived of justice because of judicial delay.

CONCLUSION

The Court should grant the petition for a writ of *certiorari* to the Court of Appeals.

Respectfully submitted,

DAVID J. CYNAMON
MATTHEW J. MACLEAN
OSMAN HANDOO
PILLSBURY WINTHROP
SHAW PITTMAN LLP
2300 N Street, N.W.
Washington, DC 20037
202-663-8000

GITANJALI GUTIERREZ
J. WELLS DIXON
SHAYANA KADIDAL
CENTER FOR
CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
212-614-6438

THOMAS B. WILNER
COUNSEL OF RECORD
NEIL H. KOSLOWE
AMANDA E. SHAFER
SHERI L. SHEPHERD
SHEARMAN & STERLING LLP
801 Pennsylvania Ave., N.W.
Washington, DC 20004
202-508-8000

GEORGE BRENT MICKUM IV
SPRIGGS & HOLLINGSWORTH
1350 "I" Street N.W.
Washington, DC 20005
202-898-5800

Counsel for Petitioners
With counsel listed on inside cover

MARCH 22, 2007